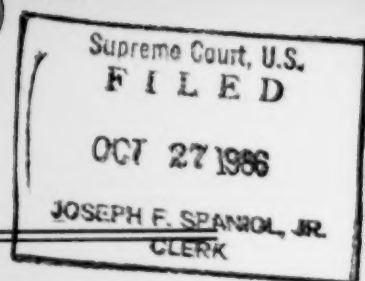


86-7 23 (2)



No.

In The
Supreme Court of the United States
October Term, 1986

— o —
BEA COHEN,

Petitioner,

vs.

WORKERS' COMPENSATION APPEALS BOARD
OF THE STATE OF CALIFORNIA; CALIFORNIA
EXTERMINATORS; ROYAL INSURANCE
CO.; EL DORADO INSURANCE CO.;
INDUSTRIAL INDEMNITY; FIREMAN'S FUND
INSURANCE; AND FREMONT INDEMNITY CO.,

Respondents.

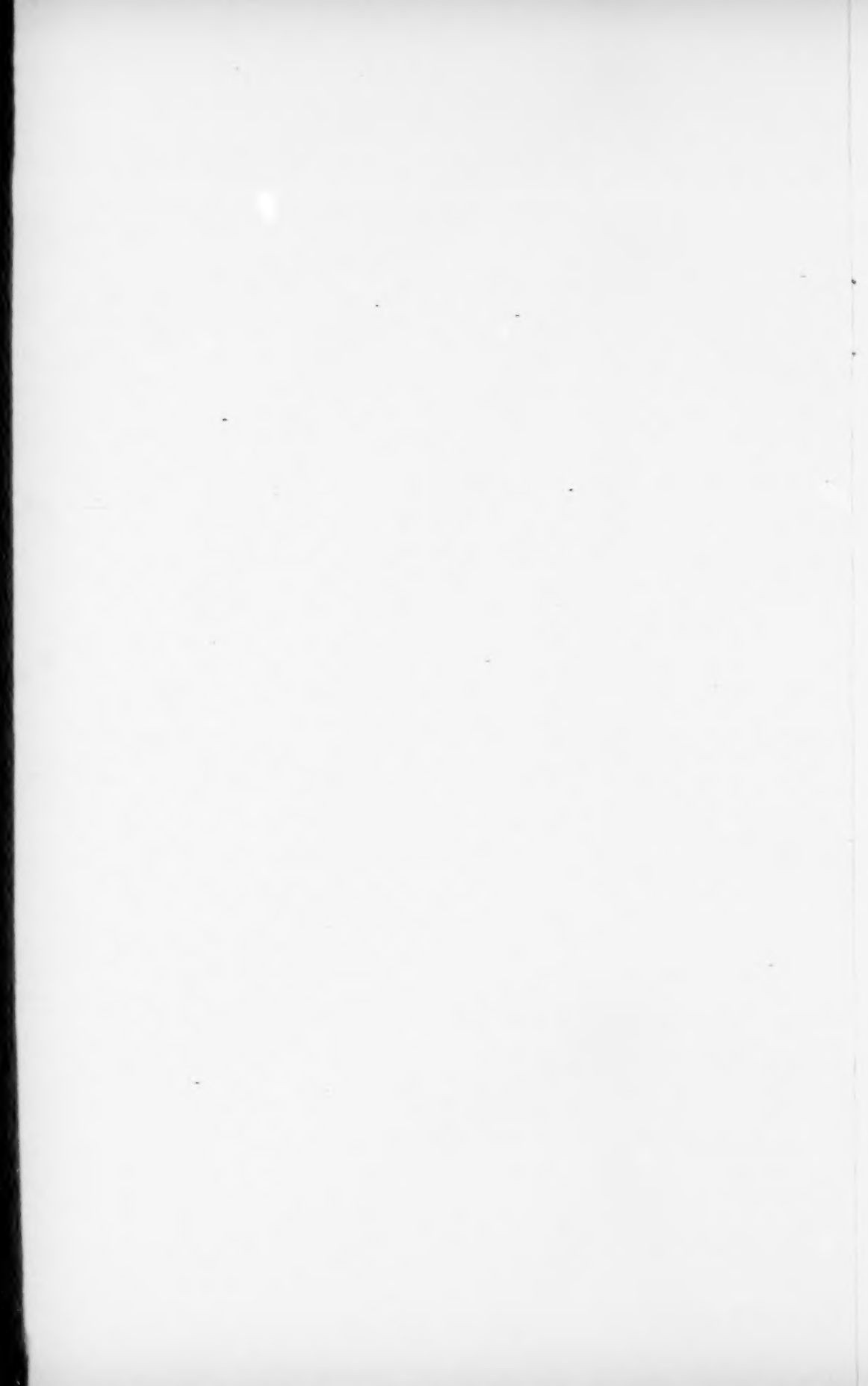
— o —
**SUPPLEMENTAL APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF CALIFORNIA,
FOURTH APPELLATE DISTRICT**

— o —
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Counsel for Petitioner

October 24, 1986

9pp



WCAB CASE NOS. 77 LA 418-809
79 LA 448-398

BEN COHEN
(DECEASED)
BEA COHEN
(WIDOW)

vs. CALIFORNIA
EXTERMINATORS;
ROYAL INSURANCE
CO.; ELDORADO
INSURANCE CO.;
INDUSTRIAL
INDEMNITY;
FIREMAN'S FUND
INSURANCE; FREMONT
INDEMNITY CO.

Workers' Compensation
Judge:

PAMELA W. FOUST

Injury:

May 1962-December 30, 1976
May 1962-September 16,
1978

REPORT AND RECOMMENDATION ON
PETITION FOR RECONSIDERATION

INTRODUCTION

Applicant, Bea Cohen, seeks timely reconsideration from the Findings and Order of January 10, 1986, granting defendant's Petition to Dismiss her application for death benefits resulting from the death of her husband, Ben Cohen. Petitioner contends that the Workers' Compensation Judge erred in finding that the application was not timely filed and should be dismissed pursuant to Labor Code section 5406 on a number of grounds.

FACTS

The facts are substantially as set forth in the Petition for Reconsideration.

DISCUSSION

Petitioner contends that since Labor Code section 3202 requires that workers' compensation statutes be liberally construed in favor of injured employees and their dependents, Labor Code section 5406 should not have been interpreted in such a manner as to bar her claim for death benefits. Labor Code section 5406 reads as follows:

"Time limits for commencement of benefits collection proceedings; generally. Except as provided in Section 5406.5, the period within which may be commenced proceedings for the collection of the benefits provided by Article 4 (commencing with Section 4700) of Chapter 2 of Part 2 is one year from:

"(a) The date of death where death occurs within one year from date of injury;

"(b) The date of last furnishing of any benefits under Chapter 2 (commencing with Section 4550) of Part 2, where death occurs more than one year from the date of injury; or

"(c) The date of death, where death occurs more than one year after the date of injury and compensation benefits have been furnished.

"No such proceedings may be commenced more than one year after the date of death, nor more than 240 weeks from the date of injury."

Petitioner has not set forth a specific "construction" of this statute by which her claim could be deemed timely and the plain language of the statute makes it difficult to conceive of one. As the Court noted in *Ruiz v. IAC*, 20 CCC 268 (1955), referring to Labor Code section 5406, "there is no ambiguity in the present wording of the section, and it neither requires nor admits of interpretation". It is

clear that claims asserted more than 240 weeks after the date of injury are barred.

The case of *Bianco v. IAC*, 9 CCC 206 (1944), cited by Petitioner, is inapplicable since it was decided prior to enactment of the present version of Labor Code section 5406 in 1947, and according to the Court in *Ruiz*, "from a review of the legislative history of section 5406, it clearly appears that the purpose of the 1947 amendment was to change the existing law as enunciated in the *Bianco* decision.

Roblyer v. WCAB, 41 CCC 669 (1976) can be distinguished from the instant case in that the dependent in *Roblyer* was a minor. *Arndt v. WCAB*, 41 CCC 151 (1976) involved just the type of knowledge of the industrial nature of the injury concerning which Ms. Cohen has filed a stipulation.

The *Ruiz* case is substantially indistinguishable from the instant case on the facts. Although the harsh result obtained in *Ruiz* has not been applied to some subsequent cases, the latter involved factual distinctions not present in the case herein. Applicant has not cited one case in which the dependent of the deceased employee has been successful in maintaining his or her claim under substantially the same fact pattern.

It is undisputed that one purpose of statutes of limitations is, as Petitioner notes in citing the case of *Addison v. State*, 21 Cal.3d 313 (1978), "to prevent the assertion of stale claims by plaintiffs who, without excuse, have failed to file their action until evidence is no longer fresh and witnesses are no longer available, thus rendering the claims difficult of (sic) impossible to defend." It is also obvious

that barring Petitioner's claim would not serve this purpose. However, it is again difficult to escape the clear words of Labor Code section 5406. In regard to this, the *Ruiz* Court expressed the opinion that,

"Accordingly, the time limitation appears not to be a normal statute of limitations, but rather to be more in the nature of a qualifying condition in the exercise of any right to death benefits. Diligence in the presentation of the claim, so as not to be guilty of sleeping on one's rights, apparently has no bearing if the specified time provisos are not satisfied."

The *Ruiz* Court had also noted that the argument that a statute of limitations should not begin to run until a cause of action accrues and there is a remedy available was precisely the one that was advanced and prevailed in the *Bianco* case, and that the Legislature presumably had knowledge of this decision when Labor Code section 5406 was amended to its present form.

The doctrine of equitable tolling, as set forth in the *Addison* case, is inapplicable to the case herein. In *Addison*, the running of the six-month limitation period of the Torts Claims Act was suspended while the plaintiff's torts claims were pending in Federal District Court. The doctrine is described as relieving "a plaintiff from the bar of a limitation statute when, possessing several legal remedies, he reasonably and in good faith pursues one designed to lessen the extent of his injuries or damage, . . ."

The cases cited by Petitioner in support of her argument that Labor Code section 5406 violates her constitutional right to equal protection, involved instances of gender discrimination and discrimination against protected classes such as illegitimate children. Actually, if Petitioner's ar-

gument in this regard were correct, it would serve to invalidate all statutes of limitations. For example, what is the difference in substance, between the applicant who files his petition for increased benefits due to the serious and wilful misconduct of the employer 364 days after the injury as compared to one who files two days later? When the Legislature decides to establish a cut-off point in the form of a statute of limitations, of necessity, there will be those who fall on both sides of the line. This does not create a separate "class" of individuals.

Although the Judge believes that the decision was correct in accordance with present law, the result is admittedly harsh in the case of an applicant whose husband undisputedly suffered from an industrially-caused disease of a progressive nature which ultimately, and not surprisingly, resulted in his death. In this regard, Herbert A. Rubin, M.D., had stated in his report of February 1, 1979, filed herein, that, "cirrhosis is irreversable and will ultimately lead to end-stage liver disease and this is a process whose rate of development cannot be reasonably predicted."

Cirrhosis of the liver is only one of a number of internal disease processes involving a protracted period of disability eventually leading to death. Perhaps in the years that have elapsed since the 1947 amendment to Labor Code section 5406 and the 1955 *Ruiz* decision, medical knowledge has progressed to extend, but not ultimately preserve the lives of individuals whom 30 years earlier would have succumbed much more quickly. It is notable that Labor Code 5406, enacted in 1980, imposes upon dependents of those deceased of asbestos exposure, the sole limitation of filing the application within one year of the date of death.

Nonetheless, any changes in the law that would permit dependents of deceased employees such as Petitioner herein to maintain their claims for death benefits appears to be a matter for the Legislature.

RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.

/s/ Pamela W. Foust

Workers' Compensation Judge
WORKERS' COMPENSATION
APPEALS BOARD

PWF:kc

SERVED: February 14, 1986—/s/Katy Ceja

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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

BEN COHEN (Deceased),
BEA COHEN (Widow),

Applicant

CALIFORNIA EXTERMINATORS;
ROYAL INSURANCE CO.; ELDO-
RADO INSURANCE CO.; INDUS-
TRIAL INDEMNITY; FIREMAN'S
FUND INSURANCE; FREMONT
INDEMNITY COMPANY,

Defendant

Case No. 77 LA 418-809
79 LA 448-398

OPINION AND
ORDER DENYING
RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation judge with respect thereto. Based on our review of the record, and for the reasons stated in said report which we adopt and incorporate, we will deny reconsideration.

The workers' compensation judge found *Ruiz v. IAC* (1955) 45 Cal.2d 409, 20 CCC 265, to be controlling in this matter. *Ruiz*, being a decision of the Supreme Court, is binding on us. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Moreover, the Workers' Compensation Appeals Board, as a creature of statute, is required to assume the validity of the statutes which created

it. (*Matthews v. WCAB* (1972) 6 Cal.3d 719, 738, 37 CCC 124, 137.)

For the foregoing reasons,

IT IS ORDERED that said Petition for Reconsideration be, and it is hereby, DENIED.

WORKERS' COMPENSATION
APPEALS BOARD

/s/ Marilyn Lazar

I CONCUR.

/s/ Richard W. Younkin

/s/ C.L. Swezey

DATED AND FILED AT SAN FRANCISCO,
CALIFORNIA MARCH 25, 1986

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN ON THE OFFICIAL ADDRESS RECORD, EXCEPT LIEN CLAIMANTS.

